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The federal industrial relations system

A guide for ORIC corporations and their employees

The Australian industrial relations system has been through a series of radical changes in the last four years. The system is still in a state of transition. Some arrangements are very complicated at the moment and will remain that way for a while. But the end result, mostly in about six or nine months' time, will be a much simpler system for most ORIC corporations.

This guide sets out the main elements of the federal industrial relations system and how they affect ORIC corporations and their employees.

Brief history

Before March 2006 (when the Work Choices legislation became law) control of industrial relations matters and the terms and conditions of employment of most employees in Australia was split fairly evenly between the Commonwealth and the States.

In March 2006, the Work Choices legislation put the federal industrial relations system onto a new constitutional foundation. From that time the federal Workplace Relations Act applied to all trading and financial corporations across Australia.

This change gave the Commonwealth coverage of many more employees in Australia than ever it had before.

But even after Work Choices, the federal system did not, and could not, apply to all employers in Australia. Except in Victoria, coverage of employees was still split between the Commonwealth and the States. This is because many employers in Australia are not trading or financial corporations.

This problem of split coverage was fixed in Victoria some time ago and is now being fixed in all the other States except for Western Australia. From 1 January 2010, South Australia, Tasmania, New South Wales and Queensland referred their powers over industrial relations, for all employees they still covered (apart from State government employees) to the Commonwealth. (Victoria referred its industrial relations powers to the Commonwealth in 1996)

But this move to a single national system is a complicated exercise, and it is still in progress. And even when it is finished there will still be two systems operating in Western Australia.

The main transitional issue relates to modern awards

In the new federal system under the Fair Work Act, about 2000 federal industrial awards have, since 1 January 2010, been replaced by about 120 or so 'modern awards'.

The modern awards apply in full from 1 January 2010 to employers who were already covered by the federal system. That includes employers in Victoria (which has been part of the federal system since 1996) and many employers in all of the other States (including Western Australia).

But modern awards have not begun to operate on employers who were not already in the federal system and who are in the four States who recently referred their powers to the Commonwealth: Queensland, New South Wales, Tasmania and South Australia.

Employees in those four States who are not employees of trading or financial corporations and who are covered by a State award will continue to be covered by their State award until 1 January 2011, when the relevant modern award that applies to them will take over.

What are the main features of the federal system?

The new federal system under the Fair Work Act brings in a number of changes. The most important ones are set out below.

The safety net

The National Employment Standards

The Fair Work Act includes a set of 10 standard terms and conditions of employment. These are called the National Employment Standards (the NES).

With some minor exceptions (for example, some conditions do not apply to casual employees), these 10 terms and conditions of employment apply to every employee covered by the federal system. And there is no transitional period. These conditions apply right now.

The terms and conditions in the NES, which cover things like hours of work, various kinds of leave, and notice of termination and redundancy, operate as minimum standards. No employee who is covered by the federal industrial relations system can be given less than what applies to them under the NES.

But they can be given more.

For example, under the NES, a full-time employee who is not a casual employee is entitled to four weeks of annual leave credits for each year they work. The employer could choose to give the employee more – say, six weeks of annual leave credits a year. But the employer could not give the employee less, say, three weeks of annual leave credits a year, even if that was in exchange for a higher rate of pay.

So the NES operates as a set of minimum standards, for **all** employees in the federal system.

The NES is an important part of what is known as the safety net.

Modern awards

The other part of the safety net under the federal system is the set of modern awards, discussed above.

There are about 120 modern awards, and they apply across most industries and occupations in Australia. The modern awards generally cover different terms and conditions of employment than those covered by the NES. But in some areas the terms and conditions overlap a little, and in some cases modern awards provide better terms and conditions than the NES.

Modern awards cannot undercut the NES – nothing can – but they can top up the NES.

For example, a modern award might provide that employees get five weeks of annual leave for each year of service. If that modern award applies to an ORIC corporation, the corporation will have to give the employees covered by that modern award five weeks of annual leave credits each year (rather than the four weeks provided for under the NES).

This means that employers who are covered by the federal system have to do at least two things to make sure that they are giving their employees their proper entitlements:

- they have to make sure that **all** of their employees are getting their minimum entitlements under the NES, and
- they need to work out which modern award (if any) applies to each of their employees. (How to do this is discussed in more detail in the 'How to Guide') Next they need to make sure their employees are getting the right entitlements under the relevant modern award that applies to them.

Key differences between the NES and modern awards are that the NES applies to all employees covered by the federal system, and it is just one set of 10 standards. By contrast, a modern award will apply to most, but not all, employees covered by the federal system. So, for example, there are some occupational groups – like information technology professionals – who are 'award-free' and who are therefore not covered by any modern award. The only element of the safety net that applies to these employees is the NES.

Another difference is that while almost exactly the same set of 10 conditions under the NES applies to all employees under the federal system, there are some differences in the content of different modern awards.

And, finally, it is quite possible that one employer might be covered by a single modern award for virtually all of their employees. Yet it will often be the case that several modern awards will apply to one employer. In this situation the employer will need to be even more careful to give the right entitlements to their employees.

Beyond the safety net

The Fair Work Act allows for employees to be given entitlements above what is in the NES and modern awards. There are several mechanisms for doing this.

Enterprise agreements

One of the main ways for an employer who is covered by the federal industrial relations system to give their employees above-award conditions is by making a collective agreement with them. This is known as an enterprise agreement.

An enterprise agreement can give employees all sorts of entitlements beyond the content of the NES or the relevant modern award. But an enterprise agreement cannot undercut the NES, and it cannot undercut the relevant modern award for that employee. An enterprise agreement must leave the employees it covers 'better off overall' than they would be under the NES and the relevant modern award.

Individual flexibility arrangements made under enterprise agreements

If (and only if) an employer has made an enterprise agreement with their employees, the employer can, if they want to, put in place 'individual flexibility arrangements' with individual employees. This is the only form of individual statutory agreement that can now be made under the Fair Work Act. It has not been possible to enter into a new Australian workplace agreement (AWA) since about April 2008.

Individual flexibility arrangements can give an employee entitlements that are better than they would receive under the enterprise agreement that applies to them. But an individual flexibility arrangement cannot undercut the terms and conditions in the enterprise agreement. (And it cannot undercut the relevant modern award, if there is one, and it cannot undercut the NES)

Contract

Regardless of whether the employer has entered into an enterprise agreement with their employees, it is open to an employer to top up the terms and conditions of employment of their employees by putting conditions into an employee's contract of employment.

The key thing to note here is that the contract of employment cannot undercut the conditions that are provided for in the NES, and the contract of employment cannot undercut the conditions provided for in any applicable modern award (and it cannot undercut the conditions provided for in a relevant enterprise agreement). An employer cannot contract out of any of these. The contract of employment can only top up the safety net. Conditions in the safety net cannot be traded off in a contract.

The situation in Western Australia

Western Australia is now the only State that has not referred its powers over industrial relations to the Commonwealth. As noted above, this leaves industrial relations arrangements in Western Australia split between the Commonwealth and Western Australia.

The federal system – the Fair Work Act – already applies to trading and financial corporations in Western Australia. If an ORIC corporation in Western Australia falls within the meaning of a trading or financial corporation, it is already covered by the federal industrial relations system.

How does an employer know if they are a trading or financial corporation?

The test of what is a trading corporation is a difficult one to apply. It will essentially revolve around the question of whether the corporation is involved in buying and selling activities to produce revenue to any significant extent. The fact that a corporation is a non-profit body does not mean that it cannot be a trading corporation. A number of bodies whose trading activities have been a relatively small part of their overall activities have been found to be trading corporations. Even so, it seems likely that a significant number of ORIC corporations will not be trading corporations.

Unless it is quite clear that an ORIC corporation in Western Australia is, or is not, a trading or financial corporation, it would be wise for the corporation to get legal advice on this issue.

There are two possibilities for an ORIC corporation in Western Australia that is not a trading or financial corporation.

A corporation may be covered by a federal award that was made under the old federal industrial relations system. But those old federal awards will cease to apply in Western Australia on 27 March 2011. From that date the corporation and its employees will come under the Western Australia State system.

There will also be ORIC corporations in Western Australia who have never been under the federal industrial relations system, because they have never been covered by a federal award and because they are not a trading or financial corporation. These corporations will remain within the Western Australia industrial relations system.

Set out below is a broad summary of the transition arrangements for all of the States and Territories in Australia. It is not completely accurate, because, for example, some parts of the Fair Work Act (for instance, the notice of termination provisions) operate on every single employer in Australia, but it gives a general picture.

State	1 Jan 2010	From 1 Jan 2011	From 27 March 2011
Vic NT ACT	All ORIC corporations were already covered in full by Commonwealth Fair Work Act	No change	No change
SA Tas NSW Qld	All ORIC corporations that were trading or financial corporations were already covered in full by Commonwealth Fair Work Act All other ORIC corporations became covered by Commonwealth Fair Work Act, but not by Commonwealth modern awards	No change All ORIC corporations become covered in full by Commonwealth Fair Work Act, including modern awards	No change No change
WA	All ORIC corporations that were trading or financial corporations were already covered in full by Commonwealth Fair Work Act All other ORIC corporations were already covered either by WA State system, or WA State system plus old Commonwealth awards	No change No change	No change All other ORIC Corporations become covered <i>only</i> by the WA State system – old Commonwealth awards stop operating